IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 782

THE TUSCALOOSA AND VICINITY DISTRICT COUNCIL OF TUSCALOOSA AND SELMA, ALABAMA; AND CARPENTERS AND MILLWRIGHTS LOCAL UNION NO. 1337, *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

I

The opposition to review of the refund question disregards the Board's actual basis of decision and substitutes for it "appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency it-

self. . . ." *Burlington Trust Lines, Inc.* v. *United States,* 371 U.S. 156, 168-169.

1. The Board's articulated basis of decision is that (a) this Court in *Local 60, Carpenters* "did not withhold from the Board the power to direct reimbursement of fees paid by *nonmembers* to obtain employment"; (b) a member of a home local union, working within the jurisdiction of a sister local union, is a nonmember; and (c) the Board may therefore require the refund of "permit fees and/or 'dobies' " paid by the member of the home local to the sister local (R. 194, emphasis supplied). The trouble with the Board's basis of decision is that it is in flat conflict with this Court's decision in *Local 60, Carpenters.* This Court did invalidate the compulsory refund of "nonmembership dues . . . and work permit fees" (365 U.S. at 652), the precise refund to so-called nonmembers ordered in this case. This Court did reject the Board's requirement, expressed throughout the administration of the refund remedy, of "reimbursement of all monies, including initiation fees, dues, *permit fees, 'dobies,'* and the like. . . ."[1] And the rejection came with respect to the refund of work permit fees paid pursuant to the constitutional authorization of the very international union, in the very situation of a member of a home local working within the jurisdiction of a sister local and paying fees to the latter, as is presented in this case. Adherence to *Local 60, Carpenters* requires summary reversal here.

2. Counsel's "*post hoc* rationalizations" are themselves but a veiled repudiation of *Local 60, Carpenters.*

[1] Petitioners' brief, p. 35, *Local 60 Carpenters* v. *N.L.R.B.*, 365 U.S. 651, quoting the statement of the then General Counsel of the Board.

(a) The opposition states that "In the present case ... the remedy granted by the Board is directed not at all dues (as, for example, those which the outside millwrights continue to pay to their home locals), but to the specific proceeds of the illegal hiring arrangement—the 'permit fees' or 'dobies' " (p. 12). But this is the exact situation that identically existed in *Local 60, Carpenters*. The order in *Local 60, Carpenters* did not direct the refund of the dues that the outside millwright paid to his home local. As to that outside millwright, the refund order was confined exclusively to the work permit fee that he paid to the sister local in whose jurisdiction he worked. The basis of the refund was said to be the coercion of the closed shop agreement as applied to the project in the jurisdiction of the sister local. It was the sister local, not the home local, that was a party to that agreement, and it was only monies paid to the sister local, not the home local, that were accordingly to be refunded.[2] The opposition thus does not distinguish between, but demonstrates the identity of, *Local 60, Carpenters* and the present case.

(b) The opposition states that, "Since the members of the outside locals had to continue paying dues to their home local while paying the dobie to Local 1337, the Board could reasonably conclude that the dobie was paid by outside millwrights only because of the requirements of the illegal hiring arrangement" (p. 11). But this argument was just as applicable in *Local 60, Carpenters*, and its lack of validity was established by this Court's rejection of the refund of "non-membership dues . . . and work permit fees." The argument is but a restatement of the Board's repudi-

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[2] Record, *Carpenters, Local 60*, No. 68, October Term, 1960, 7.

ated rationale that, but for the existence of a discriminatory hiring procedure, no worker would pay to a labor organization the monies required to maintain good standing in it. This generalization, rejected as incompatible with the history of trade unionism as an expression of "voluntary associations" (*Local 60 Carpenters,* 365 U.S. at 656), is especially inapt to the payment of a work permit fee. According to the opposition, except for the coercion of a closed shop arrangement, no member would pay a fee to the sister local and dues to the home local. Yet the payment of both is, under the ruling constitutional procedure of United Brotherhood, entirely the voluntary act of the member which he can avoid at his own pleasure. Under that procedure a member who leaves the jurisdiction of his home local to work elsewhere may, at his own option, either transfer his membership to the sister local union in the jurisdiction where the work is secured and thus pay dues to that sister local only, or he may retain his membership in his home local and obtain a working permit from the sister local in the jurisdiction of the work (Pet. for cert. pp. 18-20). When he chooses the latter, and thus chooses to pay dues to his home local and fees to the sister local, he is not acting under any constraint of any kind but is making his own independent choice which he is wholly free to make either way. Insofar as a closed shop requirement or an internal union requirement is concerned, either would be satisfied by a transfer of membership to the sister local. When a millwright, instead of transferring membership, chooses to retain his home local membership but work elsewhere, the double payment he incurs is his own voluntary act, and he can readily dispense with the double payment whenever he decides to transfer membership.

Contrary to the premise of the opposition, the double payment is therefore entirely voluntary. To presume constraint despite demonstrated voluntarism is glaring resurgence of the repudiated rationale—assumed coercion—which underlay the rejected refund remedy. And, were it the Board's business, which it is not, to question the validity as such of the payment of dues to a home local and a fee to a sister local, it would be enough to note that a person who lives in one State but works in another may be required to pay an income tax to both.

(c) Presumably to color its claim that the fees paid to the sister local were a constrained payment, the opposition asserts that the dues to the home local were $4 per month while the fee to the sister local was $4 per week (pp. 11, 4). In a letter dated February 18, 1965 written to this Court after the opposition was filed, the Government acknowledges that this statement is erroneous, and agrees that the fee to the sister local and the dues to the home local were each $4 per month. Any claim based on disparity is therefore out.[3]

3. It is a never-learned lesson that the Government's "interest . . . is not that it shall win a case, but that justice shall be done."[4] Summary reversal would give needed point to the lesson.

II

The petition presents for plenary consideration the question whether "a union commits an unfair labor

[3] We note, in any event, that disparity would be irrelevant. Whatever the amount or frequency of the fee, it is still a wholly voluntary payment which the member can dispense with whenever he pleases. The fee as such—its amount or frequency—is none of the Board's affair.

[4] *Berger* v. *United States*, 295 U.S. 78, 88.

practice when it denies referral to a job to employees for participating in a breach-of-contract and wildcat strike simply because the employer is indifferent to the unprotected character of the activity." The opposition does not deny that the question is important, that it has engendered a contrariety of opinion, and that it merits review. It urges instead that as a matter of fact "this case does not present the question. . ." (p. 10).

The Board's opposition in this Court is less forthright than its brief in the court below. In its brief below the Board stated flatly and correctly, as the central fact which the record unmistakably discloses, that "Business Agent Goodman's refusal to issue referrals to the 'old' men so they could return to work was obviously the result of his anger over their strike and their failure to terminate it when he had expected them to" (Pet. for cert. p. 10). The finding quoted in the opposition, said to be incompatible with this utterly clear statement, serves instead to confirm it fully. The finding reads that: "Goodman refused these 8-men referrals . . . because they had had referrals for January 2 but had not used them, because they had 'crossed' him, because if he issued to them referrals it would embarrass him with other locals from whom he had ordered millwrights, because they had sent a telegram to the United Brotherhood asking in effect that Goodman be investigated, because he wanted to show them he was the 'boss'" (R. 116, Opp. p. 10).

Every element of this finding confirms that the denial of referral was based on the strikers' participation in a breach-of-contract and wildcat work stoppage. Thus, (a) the striker's failure to use the referrals on January 2 was clearly a continuation of the strike by them and thus a rejection of the business agent's request

to end it. It is perhaps revealing that, in quoting the finding, the opposition omits this part of it. (b) The objection that the strikers had "crossed" him and that referral was denied to show them he was "boss" was the business agent's inelegant but unequivocal protest against the men's action in calling the strike without his authority and continuing it despite his order to return to work. Business agents do not happen to talk as fastidiously as some lawyers but are none the worse for it, and their actions are not illegal on that account. (c) The business agent's so-called embarrassment "with other locals from whom he had ordered millwrights" manifested the altogether nondiscriminatory attitude that, having arranged for replacements to come from Sheffield, Alabama, and Chattanooga, Tennessee, he was obliged to these men who were en route or had arrived from these distant places to give them the promised jobs for which they had come. (d) As the content of the telegram was a complaint by the strikers that the business agent was filling the jobs with "foreign" replacements (J.A. 153, 150), the business agent's objection to the telegram was simply reaffirmation of his opposition to the call and continuance of the strike in disregard of his authority as bargaining representative; in any event, denial of referral took place well before the telegram was sent, and could not therefore have been influenced by it.

Accordingly, as the Board informed the court below in its brief, the illegal strike was obviously the basis of the business agent's action. The opposition cannot fob this off as "all matters of internal union discipline ..." (p. 10). Whether an illegal strike is the lawful basis of denial of employment at the instance of a union no less than by the independent action of an employer is the question this case presents. The opposition should have faced rather than dodged it.

III

The opposition asserts that the finding of a discriminatory hiring procedure rests upon "a record showing actual discrimination in the operation of the referral system" rather than upon investiture of exclusive employment control in the union (p. 10). The assertion is in flat disregard of the explicit basis of decision by the Board and the court below. The Board did rely on "unfettered control" in the business agent and "referral" by him as "a prerequisite to hire at this project . . ." (R. 192). The court below did endorse that reliance by itself stating that the employer "hired exclusively through the hiring hall," granted the business agent "absolute control" over the selection of millwrights, and "refused, without any questions asked, to employ millwrights unless they could secure referrals" from the business agent (Pet. for cert. p. 7a). English has no meaning if this does not spell out reliance upon union control over hiring as the basis of illegality. And adjudication has no meaning if this basis of decision is not in complete conflict with *Local 357, Teamsters* and *News Syndicate*.

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